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DATE: April 9, 1998

In Re:

----------, by his parents,

---------- and

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Petitioner

DDESS Case No. 97-001

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Carol A. Marchant, Esq.

FOR PETITIONER

Paul L. Erickson Esq.

Ann M. Paradis, Esq.

On March 24, 1998, the Board issued a decision in the above captioned case. On March 30, 1998, the Government filed a motion for reconsideration. Petitioner submitted a response, objecting to the motion.

The Board has authority to reconsider a decision because the authority to reconsider is implicit in the authority to decide a case. However, reconsideration is not a matter to be undertaken lightly. The Board concludes that in this situation the Government has raised a non-frivolous issue.

The Government asserts that the Board erred in its March 24, 1998 decision when it stated, "Nothing in DDESS' appeal brief can be fairly construed as raising expressly or by fair implication, a challenge to the Hearing Officer's finding that the May 1996 IEP was inadequate." The Government cites their *caption* to argument "2" on page 20 of their brief as challenging the Hearing Officer on this point by stating "Whether the Hearing Officer erred when he held that Petitioner did not receive a free appropriate public education between the fall of 1994 and the summer of 1996 in spite of the preponderance of the evidence showing Petitioner made educational progress." The Government relies on the fact that the cited argument was challenging language which appeared under the heading "Conclusions of Law" and which did not specifically mention the May 1996 IEP as justifying a broad reading of their caption to include the issue. The Government's argument is not persuasive.

The Hearing Officer referred explicitly to "the inadequate May 1996 IEP" on page 30 of his decision, under the heading "Analysis and Relief," in a sentence where he dismisses the notion that the CSC was denied the opportunity to revise the inadequate IEP. He elsewhere in his "Analysis and Relief" section referred to the IEP as being "essentially an iteration of G's prior IEPs and placement" (see Hearing Officer Decision, p. 20) which implies on its face that there was problem with the IEP. Any suggestion that the Hearing Officer's finding was ambiguous is therefore not justified. The Board will not disregard a Hearing Officer's finding merely because of the heading under which it appeared.

The Government's cited caption to its argument refers to the education Petitioner received and the progress he made "between the fall of 1994 and the summer of 1996." First, it is not clear what "summer of 1996" means in the context of school or instructional years. Second, in light of the fact that the May 1996 IEP covered an educational period from the end of May 1996 to April 1997, it is not a reasonable reading of the Government's general language in the caption that said language was intended to challenge an IEP whose effective period was overwhelmingly outside the referenced period.

The Government has failed to demonstrate that the Board erred in its March 24, 1998 decision.

See Separate Opinion

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

SEPARATE OPINION OF ADMINISTRATIVE JUDGE EMILIO JAKSETIC

For the reasons that follow, I would deny the Respondent's Motion for Reconsideration without addressing it on the merits.

Nothing in 32 C.F.R. Part 80 addresses the question of whether the Board has the authority to reconsider its decisions. However, federal courts have held that even in the absence of a pertinent statutory or regulatory provision, an agency has the inherent authority to reconsider its decisions. *Dun & Bradstreet Corporation Foundation v. U.S. Postal Service*, 946 F.2d 189, 193 (2d Cir. 1991); *Trujillo v. General Electric Co.*, 621 F.2d 1084, 1086 (10th Cir. 1980); *United States v. Sioux Tribe*, 616 F.2d 485, 493 (Ct. Cl. 1980), *cert. denied*, 446 U.S. 953 (1980). There is no right to reconsideration, however, and an agency has the discretion to grant or deny any motion to reconsider. *Duval Corporation v. Donovan*, 650 F.2d 1051, 1054 (9th Cir. 1981). For the reasons set forth in the next paragraph, I believe motions to reconsider should be disfavored and granted only sparingly, regardless of how the Board ultimately rules on the merits of such motions.

In the context of industrial security clearance cases, the Board has held that reconsideration should be granted only in unusual or extraordinary circumstances. DISCR Case No. 86-1802 (September 23, 1988) at p. 2.[(1)] The same reasoning should apply in special education cases. There is a need for administrative finality in special education cases that goes beyond the mere need to have the administrative process reach closure. The parties need to know when there is administrative finality in order to decide whether to seek judicial review of a Board decision. Even if neither party wishes to seek judicial review of a Board decision, the parties need to know when there is administrative finality in order to decide how to proceed with the special education of the disabled child within the parameters of the Board's

rulings.[(2)] Because reconsideration places administrative finality in question, it should not be undertaken as a matter of course or routine. In addition, a motion for reconsideration probably will force the nonmoving party to commit time and resources and incur legal expense in order to respond to the motion. Furthermore, motions for reconsideration will place an additional burden on the Board, which will have already spent considerable time and effort on special education appeals because of their voluminous records and often complex legal issues.

In this case, the Board considered Respondent's appeal brief and addressed the issues raised by it in the Board's March 24, 1998 decision. Respondent's Motion is merely an attempt to have the Board revisit the appeal based on Respondent's claim that the Board failed to understand or appreciate the meaning of its appeal brief. If the Board were to reconsider its decisions based on such a claim, then either party to an appeal would have an incentive to ask the Board to reconsider its decision, in whole or in part, whenever a party felt that its brief was not understood or appreciated by the Board. Such a result would delay the resolution of special education cases with little benefit to the appeal process. Respondent had the opportunity to make appeal arguments in its appellate submission, and its otion fails to provide a persuasive argument why the Board should allow Respondent an opportunity to reargue part of the case.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

1. In DISCR Case No. 86-1802, the Board granted the petition for reconsideration because it raised a legal issue (*i.e.*, the legality of two-member Board decisions) that could not be raised by the parties prior to the issuance of the Board decision for which reconsideration was sought, and because consideration of the petition "[could] be expected to save valuable administrative resources and expedite resolution of th[e] case [on remand]." Neither factor applies in this case.

2. A motion for reconsideration also could have the practical effect, if not the intended consequence, of prolonging the adversarial process and making it more difficult for the parties to seek to establish the communication and cooperation so important to allow the IDEA and the DoD special education regulatory process a chance to work in connection with the special education of a disabled child. *See* DDESS Case No. 97-001 (March 24, 1998) at pp. 15, 16 and n.18, 17-18.